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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Are Wisconsin Statutes constitutionally invalid under the Supremacy Clause and the preemption rules of the National Labor Relations Act ("NLRA"), 29 U.S.C. sec. 151 et seq., in forbidding the state from purchasing any product manufactured or sold by recidivist violators of th NLRA?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. Two of the state officials are described in their official capacity, not by name. See Rule 40.4 of this Court. The Secretary of the Department of Industry, Labor, and Human Relations named below has resigned and has been succeeded by Howard S. Bellman. See Rule 40.3 of this Court.

The three state agency appellants are here sub nomine only, as they were dismissed below. See court of appeals decision at n. 1.

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REPORTED DECISIONS

The court of appeals' decision is reported as Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608 (7th Cir. 1984). The district court's decision is reported as Gould v. Wis. Dept. of Industry, Labor & H. Rel., 576 F. Supp. 1290 (W.D. Wis. 1983).

JURISDICTIONAL GROUNDS

Appellee sought declaratory and injunctive relief against Wisconsin statutes on the ground of their unconstitutionality. It posited district court jurisdiction under 28 U.S.C. secs. 1331 and 1343(3). The district court declared the statutes unconstitutional as repugnant to the Supremacy Clause and the preemption principles of the NLRA. Appellants appealed to the Court of Appeals for the Seventh Circuit, invoking

its jurisdiction under 28 U.S.C. sec. 1291.

The court of appeals entered its judgment on December 13, 1984. Notice of appeal was filed February 18, 1985, in the Court of Appeals for the Seventh Circuit. It affirmed the district court's conclusion that the state statutes are repugnant to the Constitution. This Court has jurisdiction under 28 U.S.C. sec. 1254(2).

STATUTES INVOLVED

The statutes declared unconstitutional are Wis. Stats. secs. 16.75(8) and 101.245 (1981) as created by chapter 340, Wis. Laws of 1979, effective May 21, 1980, as follows:

. . . .

> SECTION 2. 16.75 (8) of the statutes is created to read:

16.75 (8) The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245.

SECTION 3. 101.245 of the statutes is created to read:

101.245 Labor law violators. (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, 29 USC 151 et. seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

(2) This list may be compiled from the records of the national labor relations board.

(3) Whenever a new name is added to this list the department shall send the name to the department of administration for action as provided in s. 16.75(8).

(4) A name shall remain on the list for 3 years.

(5) If any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (1) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should

remove the person's or firm's name from the list.

. . . .

STATEMENT OF THE CASE

Appellee is a Delaware corporation principally doing business in Illinois. It has twenty separate divisions. During a five year period, the court of appeals affirmed and/or enforced findings of the National Labor Relations Board (NLRB) of four distinct violations of the NLRA. These proceedings were against appellee regardless of the division involved. See Gould, Inc., 216 NLRB 1031 (1975), enf'd in part, ____F.2d ____, 1977 Lab. Cases (CCH) para. 11, 953 (6th Cir. 1976); Gould Inc., 221 NLRB 899 (1974), enf'd 550 F.2d 1060 (6th Cir. 1977); Gould Inc., 237 NLRB 66 (1978), enf'd 610

F.2d 316 (5th Cir. 1980); Gould Inc., 238 NLRB 618 (1978), enf'd 638 F.2d 159 (10th Cir. 1980).

At the material times appellee's divisions were doing business with the state in amounts in excess of $10,000. One division had outstanding bids in that amount to provide goods and services to the state. On August 25, 1982, pursuant to the state statutes, appellants debarred appellee for three years from doing business with the state, and advised they would cancel existing contracts if that could be done without penalty.

Appellee commenced this action in February 1983 alleging NLRA preemption and a violation of equal protection and due process. On February 18, 1983, the district court granted preliminary injunctive relief. The parties filed

cross motions for summary judgment. On January 23, 1984, the district court declared the Wisconsin statutes unconstitutional as preempted by the NLRA, and permanently enjoined the individual appellants from debarring plaintiff under those statutes, refusing to purchase its goods, or including it on the labor law violators list. The district court subsequently awarded attorney's fees to appellee under 42 U.S.C. sec. 1988. The court of appeals affirmed the declaration of the statutes' unconstitutionality on supremacy and preemption grounds but not on equal protection or due process grounds, and reversed the judgment awarding attorney's fees.

PLENARY CONSIDERATION IS WARRANTED

This case presents a substantial federal question and requires plenary

consideration, with briefs on the merits and oral argument.

A. The decision impairs the sovereign right to choose a trading partner

Wisconsin chooses not to do business with recidivist labor law violators. The court of appeals held Wisconsin's choice offends the remedial scheme of the NLRA.

What the court missed is that states have a sovereign right to choose with whom they will deal. A state has the "sovereign right to decide how, with whom, and for whose benefit to deal." Reeves, Inc. v. Stake, 447 U.S. 429, 438 n. 10 (1980). This right is the same as the long-recognized prerogative of the "'trader or manufacturer ... to exercise his own independent discretion as to parties with whom he will deal.'" Id. at 438-39

The Commerce Clause does not restrain the choice of a trading partner. When discharging "'proprietary functions' [the states] are exempt from Commerce Clause scrutiny." Id. at 437 n. 9. For the Commerce Clause was directed at the "'regulatory and taxing actions'" of the states. Id. at 436-37. See White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 103 S. Ct. 1042, 1046 (1983) (when the states act as a market participant, the Commerce Clause establishes no barrier). As market participants, the states can even favor their own citizens over others, for "[n]othing in the purposes animating the Commerce Clause" forbids that choice "in the absence of congressional action." Hughes v. Alexandria Scrap, 426 U.S. 794, 810 (1976).

A consequence is that conflict is impossible between a state's act as a market participant and federal regulation. "When the State acts solely as a market participant no conflict between State regulation [emphasis the Court's] and federal regulatory authortity can [emphasis added] arise." United Bldg. & Const. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984).

Thus, Wisconsin enjoys the same prerogative of any trader, be it General Motors or a local druggist, to elect not to deal with law violators, be they organized crime, tax delinquents, or NLRA recidivists. For no congressional act forbids that choice by a market participant.

The court of appeals rejected this analysis for basically three reasons.

First, the court held that these

market participant cases relate only to the dormant commerce clause, whereas in the NLRA "Congress has legislated decisively in the area." Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608, 613 (7th Cir. 1984). But Congress has not legislated in the area of market participant choices. General Motors can elect not to deal with labor law recidivists without offending the NLRA, for the NLRA governs General Motors' relations with its employes, not its trading partners. Wisconsin, as a matter of its sovereignty, enjoys the same privilege.

Second, the court held Wisconsin is not acting as a market participant because its purpose is to induce compliance with the NLRA, not to efficiently spend its funds. Id. at 614. But the right to choose one's

trading partners has not been conditioned on acting from motives likely to meet a judicially approved economic policy. Matters of social and economic policy are well within the traditional sovereign powers of the states, see National League of Cities v. Usery, 426 U.S. 833 (1976), so much so that a state might make economically imprudent choices to promote social objectives, such as affirmative action, aids to the handicapped, safety, etc. In this case, Wisconsin could choose not to deal with recidivist labor law violators simply out of a policy disgust at the idea of permitting them to use money at its expense, without aiming to be a helpful gadfly to the NLRB. These choices are inherent within the prerogatives of a free market participant, particularly if the participant is a sovereign state.

Third, the court said Wisconsin had imposed a penalty on Gould that intruded on the remedial scheme of the NLRA. Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d at 612 n. 4 and n. 7 and 614. But that begs the question whether Wisconsin's decision was that of a market participant. If it was, Wisconsin imposes no more of a preempted "penalty" on appellee than does any other entrepreneur declining to trade with it.

Wisconsin, then, has made the choice of a market participant, a "simple unilateral refusal to deal" that is immune from the dormant commerce clause. See White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 103 S. Ct. 1032, 1050 (1983) (Blackmun, J., dissenting). Nowhere does the NLRA seek to affect that decision. Nowhere has Congress "unmistakably

ordained," Hayfield Northern R. v. Chicago and N.W. Transp., 104 S. Ct. 2610, 2617 (1984), that the states should be divested of this measure of their sovereignty.

This case is not even close to what has concerned this Court over the years in fashioning an NLRA preemption rule. Wisconsin does not adjudicate whether an employer has violated the NLRA. It does not provide a forum or a remedy for the aggrieved employe. It does not order others to cease business with recidivists. It simply chooses not to do business with them as a matter of social policy. Appellee's business opportunities with Wisconsin are peripheral to any NLRA interest, at best, and at the least a finding of preemption requires an unequivocal decision from Congress foreclosing to the private

market and the states the right to choose a trading partner. See Sears, Roebuck & Co. v. Carpenters, 430 U.S. 180 (1978); Farmer v. Carpenters, 430 U.S. 290 (1977); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959) (Congress' intent to preempt must be compellingly clear in matters of peripheral concern to the NLRA or if the interests are deeply rooted in local feeling and responsibility).

B. The circuits are in conflict

No other decided case is on all fours. But see J.P. Stevens & Co. v. Jackson, 85 Lab. Cas. (CCH) Para. 10,980 (N.D. Ga. 1978) (rejecting challenge to mayoral decision not to do business with a company until its discriminatory and illegal practices ceased, with virtually no discussion of the NLRA); Ohio Inns,

Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976), cert. denied, 430 U.S. 946 (1977), (rejecting due process and equal protection challenges to state termination of vendor's contract for failure to recognize unions as required by NLRA). Nevertheless, the decision cannot be squared with other cases conditioning state spending power in NLRA contexts.

In Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3rd Cir. 1977) (en banc), New Jersey was permitted to threaten withdrawal of transportation subsidies if the employer agreed with the union to pay a cost of living adjustment (COLA), despite the NLRA rule that the terms of contracts are to be left to free market forces, because (a) the state was exercising its presumed prerogatives as a private consumer to

pressure cost reductions, and (b) the NLRA specifically exempts states as employers subject to NLRB jurisdiction. Thus, Wisconsin could refuse to deal with appellee if it agreed to a COLA clause with its employes' union, even though the NLRA protects the right to agree to such a clause. It should follow that Wisconsin can refuse to deal with appellee as an NLRA recidivist violator, even if the NLRB has imposed a remedial sanction.

The court below said that does not follow, however, because Wisconsin is intruding on the NLRA remedial scheme, not functioning as a private purchaser of services to hold down costs for some permissible governmental purpose such as providing transportation services. Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d at 613-14. But

the conclusion assumes the premise, unsupported by any authority, that a state's interest as market participant is confined to choices of economic value to subserve police power enactments. The ordinary private consumer does not have police powers. Further, the conclusion is not responsive to Byrne's holding that Congress expressly exempted states from the NLRA and that states are presumed free to make choices as a market participant, absent a compellingly clear contrary congressional directive.

In Image Carrier Corp. v. Beame, 567 F.2d 1197, 1202-03 (2nd Cir. 1977), the court upheld a city resolution to deal only with unionized printers because (a) no evidence showed actual interference with an employe's right to join or not join a union and (b) it is permissible for a city to encourage union shops. It

should follow that Wisconsin can choose, as a matter of social policy, not to trade with NLRA recidivists.

The court below distinguished Beame, however, on the ground that Wisconsin is regulating employers for conduct covered by the NLRA. Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d at 613. There are two flaws in this conclusion.

First, it assumes that states have less rights as market participants than private entrepreneurs do. That is error; the states have the same right. See Reeves, Inc. v. Stake, 447 U.S. 429, 438-39 (1980). Had General Motors made the same decision as Wisconsin has made, appellee would not be heard to argue that General Motors was "regulating" its NLRA conduct. Nor should it be heard to say Wisconsin is doing so, notwithstanding

the loss of a trading partner is an additional cost resulting from its recidivism.

Second, the conclusion misses the significance of this Court's holding that, when a state acts as a market participant, conflict is impossible between the state's act and federal regulation. United Bldg. & Const. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984). If Wisconsin, as a market regulator, had required others to cease business with appellee because of its recidivism, conflict with the NLRA remedial scheme would be possible. But when Wisconsin, as a market participant, chooses for itself not to trade with recidivists, conflict with the NLRA is impossible.

CONCLUSION

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal and that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

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